Max-Benefit Sdn Bhd v Phuah Thean An & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1–11–188 OF 1999
KC VOHRAH
16 OCTOBER 2000

Civil Law Act *— Assignment — Absolute assignment — Whether there was absolute assignment — Whether plaintiffs entitled to sue in own name — Civil Law Act 1956 s 4(3)*

Land Law *— Housing developers — Damages for late delivery — Delay in completion — Whether plaintiff could bring action for late delivery damages — — Housing Developers (Control and Licensing) Regulations 1989 Schedule G*

The plaintiffs, two joint purchasers of a property from the defendant, a housing developer had jointly assigned their rights title and interests in the sale and purchase agreement to Hock Hua Bank Bhd ('the Bank') in return for a loan from the Bank to purchase the property. There was late delivery of the property which was a breach of one of the terms of the sale and purchase agreement. The magistrate's court gave a summary judgment in favour of the plaintiffs. The defendant appealed. Two questions were posed to the court: (i) whether the plaintiffs who had assigned their rights and interests in the property could sue the defendant; and (ii) whether the plaintiffs could sue for liquidated damages for late delivery.

Held, dismissing the appeal:

(1) Although the assignment was stated to be absolute, in effect it was not. The assignment was purely for the purpose of securing the loan. The implication is that the assignment of the equitable chose in action would come to an end and it would revert back to the assignors on one of the events taking place. The first event is where the loan is fully repaid. The second event is where the developer has obtained the legal title to the property and the property is then transferred to the assignors–purchasers with the consent of the assignee–bank. The assignment of the equitable estate in the property was thus conditional. Since there was no absolute assignment, the plaintiffs had locus standi to sue the defendant (see p 556C–G).

(2) By virtue of Schedule G to the Housing Developers (Control and Licensing) Regulations 1989, the plaintiffs were entitled to damages for late delivery they had suffered from the time they were supposed to have been given delivery up to the time they eventually were given vacant possession (see p 557D).

[Bahasa Malaysia summary

Plaintif-plaintif, dua pembeli bersama satu hartanah daripada defendan, telah bersesama menyerahkan hak hakmilik dan

kepentingan dalam perjanjian jual beli kepada Hock Hua Bank Bhd ('Bank tersebut') sebagai balasan terhadap satu pinjaman daripada Bank tersebut untuk membeli hartanah tersebut. Penghantaran lewat hartanah tersebut telah berlaku dan ini merupakan satu pelanggaran kepada salah satu daripada terma-terma perjanjian jual beli tersebut. Mahkamah majistret telah memberikan satu penghakiman terus yang menyebelahi plaintif-plaintif. Defendan telah membuat rayuan. Dua persoalan telah dikemukakan kepada mahkamah: (i) sama ada plaintif-plaintif yang telah menyerahkan hak dan kepentingan mereka di dalam hartanah tersebut boleh menyaman defendan; dan (ii) sama ada plaintif-plaintif boleh menyaman untuk ganti rugi yang ditetapkan kerana penghantaran lewat.

Diputuskan, menolak rayuan tersebut:

(1) Walaupun penyerahan hak tersebut telah dinyatakan sebagai mutlak, sebenarnya ia tidak begitu. Penyerahan hak tersebut adalah semata-mata untuk tujuan menjamin pinjaman tersebut. Akibatnya ialah penyerahan hak hakmilik ekuiti yang dipilih dalam tindakan akan tamat dan kembali kepada penyerah hak dalam salah satu peristiwa yang berlaku. Peristiwa pertama adalah di mana pinjaman tersebut telah dibayar semula sepenuhnya. Peristiwa kedua adalah di mana pemaju telah mendapat Penyerahan hak hakmilik ekuiti dalam hartanah tersebut adalah bersyarat. Memandangkan tiada penyerahan hak mutlak, plaintif-plaintif mempunyai locus standi untuk menyaman defendan (lihat ms 556C–G).

(2) Menurut Jadual G kepada Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1989, plaintif-plaintif berhak mendapat ganti rugi kerana penghantaran lewat yang mereka alami daripada masa mereka telah sepatutnya membuat penyerahan sehingga masa mereka akhirnya diberikan milikan kosong (lihat ms 557D).]

Notes

For cases on assignment, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2618–2628.

For cases on housing developers, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2073–2114.

Cases referred to

Durham Brothers v Robertson [1898] 1 QB 765 (refd)

Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Housing Developers (Control and Licensing) Regulations 1989 Schedule G

Appeal from: Summons No 72–67452–1998 (Magistrate's Court, Kuala Lumpur)

Rajvinder Singh (*Dennis Nik & Wong*) for the appellant.
Anthony Kuan (*SM Kam & Associates*) for the respondent.

KC Vohrah J. :

In this case the plaintiffs, two joint purchasers of a property from the defendant, a housing developer, had jointly assigned their rights title and interests in the sale and purchase agreement to Hock Hua Bank Bhd, in return for a loan from the bank to purchase the property. There was late delivery of the property which was a breach of one of the terms of the sales and purchase agreement. Summary judgment in the magistrates' court Kuala Lumpur was given in favour of the plaintiffs and the defendant has appealed against the decision of the court.

Two questions have been posed to this court in this appeal.

The first question is: can the two purchasers who had assigned their rights and interests in the sales and purchase sue the developer?

The developer says the purchasers cannot do so as they had made an absolute assignment of their rights and interest in their property to the bank within the meaning of s 4(3) of the Civil Law Act 1956 and relying on that provision and *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 argue that only the bank has the right to sue it.

Nouvau Mont Dor (M) Sdn Bhd was decided on the peculiar facts of the case. Whether or not there has been an absolute assignment is dependent on what was the aim of the transaction.

The recital in the deed of assignment refers to the fact that the assignors-purchasers had applied for a loan and that the bank had agreed to grant to the assignors a loan 'in the principal sum of Ringgit Malaysia two hundred thousand RM200,000 only ('the Loan') which expression shall include wherever the context so permits any balance or any part thereof *upon the security of the said property* and upon the terms and conditions contained in the bank's letter(s) of offer to the assignor(s) dated 28 September 1994 and upon the terms and conditions of a loan agreement of even date. (Emphasis added.)

There is also reference to the fact that the separate document of title to the property that was purchased had yet to be issued by the relevant authorities.

The assignment is in the following terms:

> IN CONSIDERATION of the Bank agreeing to grant, granting and/or continuing to grant to the Assignor(s) the Loan upon the terms and conditions more particularly set out in the Loan Agreement, the Assignor(s) hereby

ASSIGN absolutely unto the bank all the Assignor(s)'s rights title and interests in and to the said Property by and under the Principal Sale Agreement and all other whatsoever deed(s) and agreement(s) (if any) mentioned herein and the full benefit and entire advantage thereof and of all stipulations therein contained and all remedies for enforcing the same which the bank hereby accepts.

AND PROVIDED ALWAYS that notwithstanding the Assignment herein contained or any other provision of this Assignment the Assignor (s) shall and hereby undertake to continue to observe perform and be bound by all whatsoever conditions, covenants and stipulations therein on the part of the assignor(s) expressed and contained in the principal sale agreement and all whatsoever deed(s) and agreement(s) (if any) mentioned herein.

At the tail end of the assignment deed appears the consent by the developer to the assignment and there is expressed by the developer an undertaking to transfer the document of title of the strata title upon issuance of the title to the purchasers after seeking the bank's consent.

Although the assignment is stated to be absolute in effect it is not. The assignment was purely for the purpose of securing the loan. What I have adverted to shows that there was a loan which the assignors-purchasers had taken from the bank and that the loan had to be repaid over a period of time and that the rights and interests over the property were assigned as surety to ensure that the loan will be repaid. The loan or any balance or part of it was given 'upon the security of the same property.'

The implication is that the assignment of the equitable chose in action would come to an end, it would revert back to the assignors on one of the two events taking place, whichever comes earlier. The first event is where the loan is fully repaid. The second event is where the developer has obtained the legal title to the property and the property is then transferred to the assignors-purchasers with the consent of the assignee bank.

Thus it is quite obvious that the assignment of the equitable estate in the property was conditional and was merely to secure the loan and was not an absolute assignment (see *Durham Brothers v Robertson* [1898] 1 QB 765). The assignment to the bank was by way of charge only.

There was no absolute assignment in this case and the bank has no locus standi in this case. I therefore hold the purchasers as plaintiffs have locus standi to sue the developer-defendant.

The second question is this: can the purchasers sue for liquidated damages for late delivery? For late delivery and liquidated damages cl 22 of the sales and purchase agreement provides in respect of the parcel of property as between the developer (as vendor) and the purchasers thus:

(1) The said parcel shall be completed by the vendor and vacant possession with the connection of water and electricity supply to the said parcel, shall be handed over to the purchasers within thirty six (36) calendar months from the date of the agreement.

(2) If the vendor fails to hand over vacant possession of the said parcel, together with the connection of water and electricity supply to the said parcel, in time, the vendor shall pay immediately to the purchasers

liquidated damages to be calculated from day to day at the rate of ten per centum (10%)pa of the purchase price.

Vacant possession as per cl 22(1) was to have been delivered on 15 September 1997, 36 calendar months from the date of the sales and purchase agreement.

Vacant possession was handed only on 22 June 1998.

Clause 22 of the sales and purchase agreement is a provision which by virtue of Schedule G to the Housing Developers (Control and Licensing) Regulations 1989 had to be mandatorily inserted into the Sales and Purchase Agreement, it being a requirement of the prescribed contract under the said Regulations (see cl 20 of Schedule G to the second Regulation) except that while the clause relating to vacant possession in the Schedule had provided for the property to be handed over in 24 months (amended as at 1 August 1994) the developer had provided for delivery within 36 months.

Clause 20(1) of Schedule G, a statutory provision, envisages a purchaser being entitled to damages for the late delivery he has suffered from the time he was supposed to have been given delivery up to the time he eventually was given vacant possession and effect must be given to the statutory provision which quantified the liquidated damages from day to day at the rate of 10%pa of the purchase price. Clause 22 of the sale and purchase agreement is a mandatory reflection of that statutory provision and effect must be given to the clause in the agreement.

There is no dispute that the vacant possession was supposed to have been delivered on 15 September 1997 and that in fact it was delivered late on 22 June 1998 and the purchasers as plaintiffs are entitled to the liquidated damages they have claimed.

Appeal dismissed with costs.

Appeal dismissed.

Reported by Jafisah Jaafar